

THE IMPACT OF CALORIE DISCLOSURE REGULATIONS ON THE CONSUMER AND BUSINESS SECTOR

SHERI KINDEL*

I. INTRODUCTION

America's health is a concern for many, yet despite the statistics presented every year on the rise in childhood obesity and health related mortalities, we continue to eat at fast food chains and restaurants where portion control and calorie counting go out the window. For those who are concerned about health and still want to enjoy a meal out, one might think that foregoing a hamburger in favor of a salad would be a healthy meal option, but in reality this is not always the case. Comparatively, the Wendy's Garden Sensations Mandarin Chicken Salad has 31% more calories than a quarter pound Double Stack at McDonald's.¹ Since most people wouldn't know the comparison when standing in line making a decision and even fewer would spend the time to look it up online, our meal choices are least likely driven by concern for our health. If the calorie information was more readily available or apparent, would this lead to customers swapping their meal selection or even leaving certain establishments?

It is the hope of the U.S. Food and Drug Administration that requiring calorie count labels on menus will positively influence consumer decisions to purchase and eat healthy food items.² This in turn, will expectantly curb the obesity problem in America. Accordingly, the FDA mandates the disclosure of serving sizes and measurements in addition to providing calculations of nutrition based on an average daily calorie intake of 2,000 calories.³ The FDA's website asserts that calorie labels can help Americans

* Juris Doctor, The Ohio State University Moritz College of Law, 2017 expected.

¹ Meg Marco, *The Myth of Salads: Why Why Fast Food Salads Aren't Necessarily Going To Help You Lose Weight*, CONSUMERIST (May 31, 2007), <http://consumerist.com/2007/05/31/the-myth-of-salads-why-why-fast-food-salads-arent-necessarily-going-to-help-you-lose-weight/> (noting that Wendy's Garden Sensations Mandarin Chicken Salad contains 550 calories and the McDonald's 1/4 lb Double Stack contains 420 calories).

² FDA, *Menu and Vending Machines Labeling Requirements*, FDA.GOV, <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm217762.htm> (last updated Nov. 13, 2015).

³ 21 C.F.R. § 101.9 (2012).

manage their weight by reducing calorie intake.⁴ Advocates of calorie labeling believe that providing this additional information will cause Americans to make healthier choices, including purchasing less caloric food options, thus reducing obesity and solving many of the current national health problems.⁵

Due to the magnitude of the problem and the different approaches states can take in regards to regulation, the government will impose a uniform national menu-labeling regulation overseen by the FDA.⁶ The enactment of §4205 of the Patient Protection and Affordable Care Act, signed by President Obama on March 23, 2010,⁷ requires restaurants with 20 or more chains, vending machines, and other businesses whose primary business is providing food to include on their menus the calorie count of each offering.⁸ The Patient Protection and Affordable Care Act further requires the FDA to implement the calorie disclosure requirements within one year, which will expressly preempt existing state and local menu-labeling requirements.⁹ However, the impact of calorie count labels expands beyond the health of Americans and into the pockets of businesses. It may take years after enactment to see results and by that time, businesses will have already spent a significant amount of funds on nutritionist expertise and recreating menus.¹⁰ The cost to businesses and the current minimal or nonexistent impact the calorie disclosures have on consumer decisions make this regulation negatively impact the nation.

This Note will analyze federally required calorie disclosures on applicable menus, how this regulation will affect businesses based on states or cities that have already imposed their own comparable laws, and will evaluate the costs to the health benefits. Part II provides a brief history of §4205 and its enactment following several failed alternative legislations. It also offers an overview of state regulations that the federal law will be based on and a summary of the proposed federal law. Part III will discuss the law's impact on applicable businesses and their reaction to the

⁴ FDA, *How to Understand and Use the Nutrition Facts Label*, FDA.GOV, <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm274593.htm> (last updated Nov. 30, 2015).

⁵ Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 64 FOOD & DRUG L.J. 901, 916 (2010).

⁶ Tamara Schulman, Note, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 588 (2010).

⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 21 U.S.C. § 343(q)(5)).

⁸ FDA, *supra* note 2.

⁹ § 4205, 124 Stat. at 575.

¹⁰ Mary Clare Jalonick, *Where will calorie labels appear? Not just menus*, KAN. CITY STAR (May 2, 2014, 3:15 PM), <http://www.kansascity.com/news/business/article348548/Where-will-calorie-labels-appear-Not-just-menus.html>.

enactment. Part IV will evaluate the regulation's effectiveness on American's health and if the enactment actually alters consumers' behavior. Lastly, Part V will address suggestions for alternative opportunities to combat obesity and other national health concerns that provided the background to the enactment of §4205.

II. HISTORY

A. The Need for Government Regulation

Obesity rates have increased exponentially in the United States with more than one-third of adults categorized as obese.¹¹ The estimated annual medical cost of obesity in the U.S. was \$147 billion in 2008 and the medical costs for those who were obese were \$1,429 higher than those of normal weight in the same year.¹² Studies have also found that socioeconomic status impacts obesity rates among Americans.¹³ For example, women living at lower income levels and with lower education levels are more likely to be obese (though most obese women are not necessarily low income).¹⁴ Because of this, a national food stamp program, known as the Supplemental Nutrition Assistance Program (SNAP), was established to help reduce obesity concerns for those without sufficient funds to buy healthier, more expensive options.¹⁵ The government has also imposed prohibitions of trans fats, mandated exercise in schools, and regulated marketing and advertising of food to help combat obesity.¹⁶ While some people believe these changes benefit society, critics of governmental intrusion claim that these actions limit individual rights, freedoms, and personal choices.¹⁷

Furthermore, in recent years, Americans are experiencing a trend of eating substantially more meals away from the home.¹⁸ In fact, approximately 33% of their daily calories are consumed outside of their homes and about 42% of their food budget is spent at restaurants.¹⁹

¹¹ CDC, *Adult Obesity Facts*, CDC.GOV, <http://www.cdc.gov/obesity/data/adult.html> (last updated Sept. 21, 2015).

¹² *Id.*

¹³ Joan R. Rothenberg, *In Search of the Silver Bullet: Regulatory Models to Address Childhood Obesity*, 65 FOOD DRUG L.J. 185, 188 (2010).

¹⁴ CDC, *supra* note 11.

¹⁵ *Id.* at 192.

¹⁶ *Id.* at 194-96, 201.

¹⁷ Katherine Mayer, Note, *An Unjust War: The Case Against the Government's War on Obesity*, 92 GEO. L.J. 999, 1008 (2004).

¹⁸ See U.S.D.A., 829 AGRIC. ECON. REP., THE DEMAND FOR FOOD AWAY FROM HOME: FULL-SERVICE OR FAST FOOD? (2004).

¹⁹ *Information to Make Choices: Dietary Guidelines for Americans, Food and Menu Labeling, and Marketing Standards*, STATE OF OBESITY,

Comparing these numbers to the 18% of daily calories consumed outside Americans' homes from 1977 to 1978 and 25% of food budgets spent at restaurants, and in light of the concurrent rise in obesity, it is easy to see why advocates of this calorie labeling regulation are so concerned.²⁰ A study in New York City found that approximately 10% of the city's restaurants consist of restaurant chains that constitute more than one third of all restaurant traffic.²¹ This increase in calorie consumption and foot traffic in fast food chains has been found to be a leading cause of excess calorie intake,²² which drives weight gain relative to calorie use.²³

In addition to eating more meals away from the home, the typical American also tends to over-eat at restaurants.²⁴ This is due to a combination of large portion sizes and the difficult time consumers have in assessing and analyzing the calorie content in restaurant foods.²⁵ In fact,

<http://stateofobesity.org/menu-labeling> (last visited Apr. 1, 2016); See also Laurence Holland & David Ewalt, *How Americans Make and Spend Their Money*, FORBES, (July 19, 2006, 10:00 AM) http://www.forbes.com/2006/07/19/spending-income-level_cx_lh_de_0719spending.html.

²⁰ Joanne F. Guthrie et al., *Role of Food Prepared Away From Home in the American Diet, 1977-78 versus 1994-96: Changes and Consequences*, 34 J. NUTR. EDUC. BEHAV. 140, 142-43 (2002).

²¹ N.Y. City Bd. of Health, *Notice of Intention to Repeal and Reenact §81.50 of the New York City Health Code*, NYC.GOV, 12 (Oct. 2007), <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf> (last visited Apr. 1, 2016).

²² See SA French et al., *Fast Food Restaurant Use Among Women in the Pound of Prevention Study: Dietary, Behavioral and Demographic Correlates*, 24 INT'L. J. OBESITY 1353, 1354 (2000), <http://www.nature.com/ijof/journal/v24/n10/pdf/0801429a.pdf> (last visited Apr. 1, 2016).

²³ See Marie-Pierre St-Onge et al., *Changes in Childhood Food Consumption Patterns: A Cause for Concern in Light of Increasing Body Weights*, 78 AM. J. CLINICAL NUTR. 1068, 1069 (2003), <http://www.ajcn.org/cgi/reprint/78/6/1068.pdf> (last visited Apr. 1, 2016).

²⁴ Michael McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1173 (2004).

²⁵ See Pierre Chandon & Brian Wansink, *The Biasing Health Halos of Fast-Food Restaurant Health Claims: Lower Calorie Estimates and Higher Side-Dish Consumption Intentions*, 34 J. CONSUMER RES. 301, 302 (2007); see also N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 136 (2d. Cir. 2009) (citing Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1669-75 (2006) (finding that calories in restaurant items were almost two times more than what consumers expected)); see also Am. Inst. for Cancer Research, *New Survey Shows Americans Ignore Importance of Portion Size in Managing Weight*, CHARITY WIRE, (Mar. 24, 2000), <http://www.charitywire.com/charity10/00201.html> (finding that according to an

when restaurants claim to provide healthy dishes, consumers typically underestimate the number of calories in their meals or order higher-calorie side dishes, drinks, or desserts in addition to a lower calorie meal.²⁶ Ordering higher calorie menu items in addition to a low-calorie meal is known as the “halo” effect and leads to an increase in popularity of healthier fast-food restaurants.²⁷ Americans believe that they are eating healthier at these restaurants, but in reality, overall there are no changes in obesity rates or a decrease in calorie consumption.²⁸

Proponents of a national calorie count regulation argue that without implementation of §4205, nutritional information on restaurant meals is difficult to find and is usually only likely be distributed through brochures, websites, and wall displays outside of the dining area or other area where orders are placed.²⁹ For this reason, Americans are generally not aware of how many calories they are consuming at restaurants.³⁰ Supporters believe this new regulation will ensure availability of nutritional information for those looking for healthier fast-food restaurants or meals and will reduce the “halo” effect by providing accurate and reliable information.³¹

B. Failed Attempts at Regulation

Before Congress passed §4205 in 2010, the federal government created a requirement of food service facilities to provide a brochure for customers upon request including information about calories, sodium, saturated fat, and carbohydrates for each standard menu item.³² In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”), which created national standards and requires all drugs to be approved by the Food and Drug Administration (“FDA”) before they are sold on the market.³³ The Nutrition Labeling and Education Act (“NLEA”) of 1990 amended the

American Institute for Cancer Research survey, most Americans are unaware that portions they consume have increased in size).

²⁶ Chandon & Wansink, *supra* note 25, at 302.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Schulman, *supra* note 6, at 597.

³⁰ *Id.*

³¹ See Chandon & Wansink, *supra* note 25.

³² See John R. F. Baer et al., BUSINESS LAWS AND REGULATIONS THAT AFFECT FRANCHISE SYSTEMS, A.B.A., (2010), http://www.gpmlaw.com/portalresource/Business_Laws_and_Regulations_that_Affect_Franchise_Systems_Updated_October_2014_MKirsch.pdf.

³³ Charles R. Yates, III, Note, *Trimming the Fat: A Study of Mandatory Nutrition Disclosure Laws and Excessive Judicial Deference*, 67 WASH & LEE L. REV. 787, 790 (2010).

FDCA to prescribe nutrition labeling for packaged foods sold in grocery stores.³⁴

In 2007, Senator Tom Harkin introduced the Healthy Lifestyle and Prevention (“HeLP”) America Act with a menu-labeling provision.³⁵ In the same year, Representative Tom Udall introduced a similar bill in the House.³⁶ Both failed.³⁷ Later in 2007, Representative Rosa DeLauro introduced the Menu and Education Labeling (“MEAL”) Act in the House.³⁸ This bill was to amend the FDCA to extend the food labeling requirements for the nutritional content of standard menu items to large chain restaurants.³⁹ The MEAL Act would have taken §4205 of the Affordable Care Act one step further by requiring chain restaurants to post the total number of calories, grams of saturated fat, and milligrams of sodium next to items on menus.⁴⁰ It also required restaurants to notify patrons that the nutritional information would be provided in writing at their request.⁴¹ However, Congress never passed the MEAL Act, and in 2008, Senator Tom Carper, Senator Lisa Murkowski, and Representative Jim Matheson introduced the Labeling Education and Nutrition (“LEAN”) Act in the Senate to amend the FDCA with respect to nutrition labeling.⁴² This proposed bill, similar to §4205, would have provided federal menu-labeling standards for food offered for sale in food service establishments.⁴³ It lowered the standard set forth in the MEAL Act by only requiring calorie disclosures on menus and minimized penalties for potential noncompliance.⁴⁴ Even though the restaurant industry supported this proposed bill because it would allow consumers to make informed decisions,⁴⁵ legislators considered the LEAN Act to be less effective than

³⁴ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101- 535, 104 Stat. 2352 (codified as amended at 21 U.S.C. § 343 (2006)).

³⁵ Healthy Lifestyles and Prevention America Act, S. 1342, 110th Cong. § 401 (2007).

³⁶ Healthy Lifestyles and Prevention America Act, H.R. 2633, 110th Cong. § 401 (2007).

³⁷ *Id.*

³⁸ *See generally* Menu Education and Labeling Act, H.R. 3895, 110th Cong. (2007).

³⁹ *Id.*

⁴⁰ *Id.* at § 3.

⁴¹ *Id.*

⁴² Labeling Education and Nutrition Act of 2008, H.R. 7187, 110th Cong. (2008); Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong. (2008).

⁴³ Labeling Education and Nutrition Act of 2008, S. 3575, *supra* note 42, at § 6.

⁴⁴ Jodi Schuette Green, *Cheeseburger in Paradise? An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 743-744 (2010).

⁴⁵ *New Coalition Advocates National Nutrition Standard for Chain Restaurants*, NAT’L RESTAURANT ASS’N, (Oct. 21, 2008),

the MEAL Act and not strict enough in enforcement,⁴⁶ so it failed like the other attempts. Since none of the proposed bills were signed, regulation was left to the states.

C. State and City Regulations

The U.S. Constitution does not expressly give Congress the power over public health regulations, but it derives this power from the Commerce Clause, the Taxing and Spending Clause, and the Necessary and Proper Clause.⁴⁷ Historically, public health has been an area of law and regulation reserved for the states.⁴⁸ While Congress has imposed laws as a “floor,” states can impose further restrictions as they see fit.⁴⁹ Some of the regulations include providing nutritional food to students and children in child care programs, mandating physical activity in schools and child care settings, and setting limits on television viewing.⁵⁰ In the community, cities are using zoning and land use laws to provide better access to affordable food options in certain neighborhoods.⁵¹ Many states also impose taxes on foods with low nutritional value in order to curb consumer spending.⁵²

In addition to these programs and regulations, the implementation of calorie disclosure regulations, similar to the new federal law, began in New York City in December 2006, followed by California in 2008.⁵³ In 2006, the New York City Board of Health amended the Health Code under §81.50 to adopt menu-labeling regulations.⁵⁴ In 2007, the New York State Restaurant Association (NYSRA), a non-profit made up of over 7,000 restaurants, brought a lawsuit arguing that the regulation was expressly preempted by the Nutrition Labeling and Education Act of 1990, and that it violated its members’ First Amendment rights.⁵⁵ Federal Law was held to preempt the

<http://www.restaurant.org/Pressroom/Press-Releases/New-Coalition-Advocates-National-Nutrition-Standar.htm>.

⁴⁶ Labeling Education and Nutrition Act of 2008, S. 3575, *supra* note 42.

⁴⁷ LAWRENCE A. GOODMAN ET AL., *LAW IN PUBLIC HEALTH PRACTICE* 52-53 (2d ed. 2007).

⁴⁸ *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 250 (1829).

⁴⁹ Lauren Slive, *Closing the Kitchen? Digesting the Impact of the Federal Menu Labeling Law in the Affordable Care Act*, 22 U. FLA. J.L. & PUB. POL’Y 255, 259 (2011).

⁵⁰ Banker, *supra* note 5, at 902 (citing Judith A. Monroe, *Legal Preparedness for Obesity Prevention and Control: A Framework for Action*, 37 J.L. MED. & ETHICS 15, 17 (2009)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ NAT’L CONF. ST. LEGIS., *Trans Fat and Menu Labeling Legislation* (2013), <http://www.ncsl.org/research/health/trans-fat-and-menu-labeling-legislation.aspx>.

⁵⁴ N.Y. City Bd. of Health, *supra* note 21.

⁵⁵ N.Y. State Restaurant Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

city's regulation because the city had the power to mandate nutritional labeling, but its implementation "offended the federal statutory scheme for voluntary nutritional claims."⁵⁶ In 2008, New York City's Health Department required calorie information to be posted on menus and menu boards of restaurants with standard menus because the regulation, as enacted, was preempted by federal law.⁵⁷ Also in 2008, California became the first state to take this nutritional scheme beyond the city level and impose calorie disclosures statewide.⁵⁸ Maine, Massachusetts, and Oregon all enacted menu-labeling regulations in 2009, followed by New Jersey and Tennessee in 2010.⁵⁹ By February 2010, three other local governments including King County, Washington, Philadelphia, Pennsylvania and Westchester County, New York adopted menu-labeling laws.⁶⁰ At the same time, five counties and five states passed menu-labeling laws, but had not yet implemented them.⁶¹ Between 2003 and 2009, twenty-four other states proposed similar laws.⁶² Even though many states began implementing calorie labeling, the NLEA continued to reserve authority to state and local governments to require the disclosure.⁶³

D. The Current Structure of the FDA Bill

After a decade of various states and cities imposing their own regulatory mandates regarding calorie disclosure and labeling, Congress finally passed the Patient Protection and Affordable Care Act on March 23, 2010, making menu labeling national.⁶⁴ The Supreme Court then affirmed the law in 2012.⁶⁵ This is the first federal menu-labeling law to make it past committee.⁶⁶ Section 4205 of the Affordable Care Act amends the NLEA's provisions, extending nutrition labeling to restaurant food.⁶⁷

⁵⁶ *Id.* at 353.

⁵⁷ *Id.*

⁵⁸ Baer, *supra* note 32, at 6.

⁵⁹ *Id.* at 8-9.

⁶⁰ Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 864 (2010).

⁶¹ *Id.*

⁶² Anthony J. Marks, *Menu Label Laws: A Survey*, 29 FRANCHISE L.J. 90, (2009); Bernell, *supra* note 60, at 854.

⁶³ Baer, *supra* note 32, at 5.

⁶⁴ Slive, *supra* note 49, at 266.

⁶⁵ Marion Nestle, *Use of Menu Labeling: Baseline Data from USDA*, FOOD POL (July 7, 2014), <http://www.foodpolitics.com/2014/07/use-of-menu-labeling-baseline-data-from-usda/>.

⁶⁶ See Christine Cusick, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 SANTA CLARA L. REV. 989, 1002 (2011).

⁶⁷ *Id.*

The law states that every big restaurant chain in the nation will be required to post calorie information on their menus and drive-through signs.⁶⁸ Under §4205, “calorie content must be posted on menus, menu boards, drive through displays, internet and take-out menus if they are the primary menu used for ordering, or other avenues in close proximity to the item.”⁶⁹ According to the New York Times, the purpose of this law’s labeling mandate is to create a public health benefit by affecting the decisions of consumers who are purchasing food outside of the home.⁷⁰

Section 4205 includes a menu-labeling provision requiring calorie information to be posted adjacent to the menu item.⁷¹ It also requires the prominent posting of a suggested daily calorie intake on the menu, and for supplemental nutritional information to be available on demand.⁷² However, condiments and “special” menu items, available for sixty days or less, are exempt from this requirement.⁷³ Vending machine operators and owners are also required to post calorie information if they own or operate twenty or more such machines.⁷⁴ Those who do not fall into these categories can also voluntarily provide the information and register with the Secretary of Health and Human Services.⁷⁵ This will save them efforts in the future if any applicable local regulations survive federal preemption.⁷⁶ Even though this law preempts any state or local laws that regulate the restaurants covered by the federal bill, including most chain restaurants that would only have to follow the federal standard, there is an exception for local regulations that apply to restaurants with less than twenty locations operating under the same name and selling substantially the same items.⁷⁷

The new law will require calorie and other nutrition labeling for “standard menu items offered for sale in a restaurant or similar retail food establishment that is part of a chain with twenty or more locations, doing business under the same name, and offering for sale substantially the same

⁶⁸ Stephanie Rosenbloom, *Calorie Data to be Posted at Most Chains*, N.Y. TIMES Mar. 23, 2010, at 1.

⁶⁹ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573-76 (codified as amended at 21 U.S.C. § 343(q)(5)(H)(i)-(ii) (2012)).

⁷⁰ Rosenbloom, *supra* note 68.

⁷¹ § 4205(b), 124 Stat. at 573-76.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(d), 124 Stat. 119, 576 (codified as amended at 21 U.S.C. § 343(q)(5)(H)(i)-(ii) (2012)).

menu items.”⁷⁸ Section 4205 of the Affordable Care Act provides definitions to clarify the requirements. The writers of the federal register proposed covered establishment to mean, “a restaurant or similar retail food establishment that is a part of the chain with twenty or more locations doing business under the same name (regardless of the type of ownership, e.g. individual franchises) and offering for sale substantially the same menu items,” as well as a restaurant or similar retail food establishment that is registered to be covered under § 403(q)(5)(h)(ix) of the FDCA.⁷⁹ According to the FDA’s rules proposed on April 1, 2011, a retail food establishment is defined as “an establishment whose primary business activity is the sale of food to consumers,” or in the alternative as an establishment where the sale of restaurant or restaurant-type food-as opposed to food in general-is the primary business activity of the establishment.⁸⁰ A primary business activity is further defined in this section based on, “if the establishment presents itself, or has presented itself publicly as a restaurant (primary purpose 1), or a total of more than fifty percent of that retail establishment’s gross floor area is used for the preparation, purchase, service, consumption, or storage of food (primary purpose 2).”⁸¹ Menus and menu boards are defined as “the primary writing of the covered establishment from which a customer makes an order selection.”⁸² Advertisements, such as coupons, can also constitute menus, but only when they display a purchase price with a specific food item and a phone number to place an order.⁸³

Vending machines will also be affected by this federal regulation.⁸⁴ According to §4205 of the Affordable Care Act, operators who own or operate twenty or more vending machines will be required to disclose calorie information for food sold from vending machines.⁸⁵ Vending machine operators must post calorie information, visible in a clear and conspicuous manner for consumers to view.⁸⁶

Section 4205 does not apply to independent restaurants, bars, grocery stores, food trucks, ice cream trucks, or food served on airplanes or other

⁷⁸ See FDA, *Menu and Vending Machine Labeling Requirements*, *supra* note 2, at 1.

⁷⁹ 21 C.F.R. § 101.11 (2016).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Chalana N. Williams, *FDA’s Menu Nutritional Labeling Rule may Have the Unintended Consequence of Preserving the Status Quo*, CROWELL MORING, (Sept. 2015), <https://www.crowell.com/NewsEvents/All/FDAs-Menu-Nutrition-Labeling-Rule-May-Have-the-Unintended-Consequence-of-Preserving-the-Status-Quo>.

⁸³ *Id.*

⁸⁴ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573-576 (codified as amended at 21 U.S.C. § 343(q)(5) (2012)).

⁸⁵ See FDA, *U.S. Food and Drug Admin.*, *supra* note 2.

⁸⁶ *Id.*

transport vehicles.⁸⁷ Big box stores, including Target and Costco, will also be covered under the menu-labeling laws. Pizza restaurants can list calories by the entire pizza or by the slice, but they need to also include how many slices are in a pizza.⁸⁸ These restaurants can also list a range of calories depending on the various combinations of possible toppings.⁸⁹

Seasonal items that are on menus for less than sixty days, market testing of food items for less than ninety days, condiments, chef specialties and custom orders are exempt from the new law.⁹⁰ However, “one could foresee restaurants evading disclosure requirements by keeping its entire menu, or just the unhealthiest offerings, as seasonal items or market test items.”⁹¹ Section 4205 also requires additional nutritional information to be available in writing upon consumer’s request, including fat, sodium, and sugar content.⁹² Listed on menus, in addition to the calorie labels, must also be a statement of the FDA’s recommended average calorie intake.⁹³

Small businesses may be subject to more stringent laws if the state in which they operate imposes applicable additional regulations.⁹⁴ However, restaurants with less than twenty chains can voluntarily opt-in to §4205 if they prefer to operate under the federal law instead.⁹⁵ By opting-in to §4205, retail food establishments will be immune from state and local laws that might be stricter about calorie disclosures.⁹⁶ The restaurant or similar retail food establishment or vending machine operator who wishes to be subject to the requirements of §4205 must register biannually with the Secretary under the name and address of his/her business.⁹⁷

Those business covered by the regulation have asked for an additional year to comply with the federal menu labeling requirements.⁹⁸ The FDA has granted this additional time as necessary for all covered businesses and

⁸⁷ 21 C.F.R. § 101.11 (2016).

⁸⁸ Andy Knaf, *The FDA’s new Menu Labeling Requirements Could Help Pizzerias Control Costs, but will they also Hurt Sales?*, PMQ PIZZA MAGAZINE, (Mar. 2015), <http://www.pmq.com/March-2015/The-FDAs-new-menu-labeling-requirements-could-help-pizzerias-control-costs-but-will-they-also-hurt-sales/>.

⁸⁹ *Id.*

⁹⁰ 21 C.F.R. § 101.11 (2016).

⁹¹ Slive, *supra* note 49, at 268.

⁹² The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573-576 (codified as amended at 21 U.S.C. § 343(q)(5) (2012)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at § 4205(b), 124 Stat. at 575.

⁹⁷ *Id.*

⁹⁸ Tennille Tracy, *FDA Requires Calorie Counts at Restaurants*, WALL ST. J., (Nov. 25, 2014), <http://www.wsj.com/articles/federal-government-to-mandate-more-calorie-counts-1416878402>.

establishments to obtain the nutrition information and change their menus and other signage.⁹⁹ The new compliance date for those covered by the menu-labeling rule, according to the FDA, will be December 1, 2016.¹⁰⁰ While retailers covered by the regulations have an additional year to comply, vending-machine operators have two years to comply.¹⁰¹ Violations of §4205 could render a food item misbranded under the FDCA, following §343 of FDCA, and result in civil or criminal penalties.¹⁰²

III. IMPACT

A. Costs Incurred by Businesses

Despite the proponents of §4205 holding that, in the long run, healthcare costs will decrease, an immediate negative financial impact will be felt by the businesses that are forced to comply. The implementation of the calorie disclosures could cost owners and operators up to \$42,000 a year.¹⁰³ In addition to the cost of nutrition analysis, retail food establishments also need to cover the cost of new menus.¹⁰⁴ For example, pizza chains claim the new signage could cost as much as \$5,000 per store and could deter customers from purchasing their products.¹⁰⁵ According to the Food Marketing Institute, which represents grocery stores, these stores could pay over \$1 billion in the first year, with rising costs per year, to comply with §4205.¹⁰⁶

The calorie disclosure law will also affect franchises that operate as independent small businesses.¹⁰⁷ Each franchise will need to pay for new menus and signs including the calorie information and will need to update them every time recipes change or new products are offered.¹⁰⁸ Franchises also need to accommodate inspectors and nutritionists who will constantly

⁹⁹ See FDA, *Menu and Vending Machine Labeling Requirements*, *supra* note 2.

¹⁰⁰ *Id.*

¹⁰¹ Tracy, *supra* note 98.

¹⁰² Cusick, *supra* note 66, at 994; 21 USCS § 343 (2016).

¹⁰³ Jalonick, *supra* note 10.

¹⁰⁴ Tracy, *supra* note 98.

¹⁰⁵ See, e.g., Jeremy Bowman, *Why Domino's Hates the New FDA Rules*, MOTLEY FOOL (Nov. 30, 2014, 9:00 AM), <http://www.fool.com/investing/general/2014/11/30/why-dominos-hates-the-new-fda-rules.aspx>.

¹⁰⁶ Tracy, *supra* note 98.

¹⁰⁷ See Jason Stverak, *Obamacare's Restaurant Calorie-Label Mandate Is A Complete Mess*, FORBES (Feb. 7, 2014, 2:46 PM), <http://www.forbes.com/sites/theapothecary/2014/02/07/obamacares-restaurant-calorie-label-mandate-is-impossible-to-implement/>.

¹⁰⁸ *Id.*

be analyzing the food to confirm compliance.¹⁰⁹ Many franchisees have opposed the new law for what they consider to be government overregulation, and that the new signage can cost up to \$5,000 per store.¹¹⁰ For franchisees who own multiple stores, this cost quickly adds up and could leave businesses significantly burdened. Additionally, those businesses that refuse to comply or are taking longer to post new menus are at a disadvantage in the eyes of consumers who are concerned with healthy eating and will not support businesses that do not encourage their interests.¹¹¹

Businesses have in turn absorbed the costs of the calorie labeling in several different fashions. Since some restaurant chains have in-house nutritionists or special software to determine calorie counts, they can more quickly comply with the federal regulation in comparison with those owners and operators who need to seek outside assistance for nutrition analysis.¹¹² According to Bob McDevitt, senior vice president of franchising of Golden Corral, the corporation has paid approximately \$200,000 for a nutrition analyst since the law came into effect.¹¹³ President of The Melting Pot, Mike Lester, was more enthusiastic about the Affordable Care Act requirements and developed a strategy to keep analyst costs manageable.¹¹⁴ The restaurant analyzes smaller changes in-house and thus the initial analysis cost was \$10,000 with additional yearly updates costing about \$5,000 to \$6,000.¹¹⁵ LYFE Kitchen provides another option for maintaining costs for nutritional analysis by utilizing several sources.¹¹⁶ A contracted nutritionist analyzes all foods and then visits ten stores at least twice a year to inform LYFE Kitchen of any adjustments that need to be made.¹¹⁷ This nutritionist typically costs \$3,000 to \$5,000 per year.¹¹⁸ Additionally, LYFE Kitchen's culinary team visits each store twice a year to verify that dishes are prepared in accordance with standards so that the nutrition labels are as accurate as possible.¹¹⁹ A lab will also perform tests

¹⁰⁹ *Id.*

¹¹⁰ Bowman, *supra* note 105.

¹¹¹ *Id.*

¹¹² Leslie Collins, *How new FDA menu rules will affect restaurants*, KAN. CITY BUS. J. (Dec. 16, 2014, 12:00 PM), <http://www.bizjournals.com/kansascity/news/2014/12/16/how-new-fda-menu-rules-will-affect-restaurants.html>.

¹¹³ Amanda Baltazar, *Analyze This: The Cost of Counting Calories*, RESTAURANT BUS. (Sept. 2, 2014), <http://www.restaurantbusinessonline.com/operations/sales-finance/analyze-cost-counting-calories#sthash.ALxn9PA.t.UfjkhUX.dpuf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Baltazar, *supra* note 113.

on the nutrition profile of random dishes to ensure accuracy, charging LYFE Kitchen per item, which generally totals \$5,000 per year.¹²⁰ Burgerville, located in Vancouver, Washington, has not been so lucky as to pay the small amount accrued by LYFE Kitchen with the costs of its nutritionist.¹²¹ Using an external nutritionist who charges by the hour was not cost effective for Burgerville since work was distributed as-needed and the nutritionist provided a quick turnaround.¹²² The expertise of this individual cost the restaurant around \$86,000.¹²³

The complexity of the restaurants' menus will also impact the cost to businesses, as build-your-own meal establishments will have calorie counts depending on the combination of food items, and disclosing the numerous combinations would be excessive on a menu.¹²⁴ Opponents of the regulation also argue that the law restricts creativity and development of new recipes and limits menu changes and variety.¹²⁵ Therefore, restaurants that change their menu often will be impacted more than those who change their menus infrequently, or not at all.¹²⁶ Additionally, restaurants with standard dishes would have lower costs since every employee should be using the same amount of ingredients making the consistency easier to analyze.¹²⁷

The costs of the regulation unequally impact businesses and could create a wider gap in revenue as some stores can better absorb the costs than others.¹²⁸ For example, smaller chains will not be able to absorb the costs as well as large chain restaurants.¹²⁹ Furthermore, individually owned franchises will have even more difficulty bearing the costs.¹³⁰ While every covered business will be impacted by the regulation, as a result of the above inequality, the smaller businesses that are covered argue that the law will be

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Collins, *supra* note 112.

¹²⁵ Dayna B. Royal, *The Skinny On The Federal Menu-Labeling Law & Why It Should Survive A First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 197 (2011).

¹²⁶ Collins, *supra* note 112.

¹²⁷ *Id.*

¹²⁸ Tiffini Diage, *Menu Calorie Postings in Restaurants: Policy Intervention to Prevent and Reduce Obesity*, U. WIS. POPULATION HEALTH INST. ISSUE BRIEF NO. 4, at 2 (Nov. 2009), <http://uwphi.pophealth.wisc.edu/publications/issue-briefs/issueBriefv09n04.pdf> (stating "larger corporate businesses may be able to absorb costs or revenue losses across a large volume of stores, but many chain restaurants are operated as individually owned franchises").

¹²⁹ Richard Posner, *Compelled Disclosure of Food Characteristics*, BECKER-POSNER BLOG (July 27, 2008, 8:11 PM), <http://www.becker-posner-blog.com/2008/07/compelled-disclosure-of-food-characteristics--posner.html>.

¹³⁰ Diage, *supra* note 128.

unduly burdensome in comparison to the larger chains that have the financial ability to cover the costs of new menus and a nutritionist.¹³¹

B. Businesses Reactions to the Regulation

The National Restaurant Association (NRA), which advocates for restaurant operators, has recently commented on the new menu-labeling regulation.¹³² While it recognizes the benefits of improving the nation's health, it also expresses concerns from the information being inaccurately calculated or displayed.¹³³ Betsy Craig, CEO and founder of MenuTrinfo, a leading consulting firm for menu nutrition certification, claims there will be a learning curve for restaurants, and since most restaurant owners are not trained nutritionists, they should begin the process early.¹³⁴ Craig believes the transition will not be smooth or easy and warns that it will take longer than restaurant owners think to get the job done.¹³⁵ Overall, the success of the menu labeling in decreasing America's obesity problem may not be as substantial as the time owners spend complying with the regulations and the money they spend on hiring a nutritionist.¹³⁶

Some critics claim that the federal law is an unnecessary government intrusion into private decision-making and there is little evidence to support the expected result of decreasing obesity in America and encouraging healthy eating.¹³⁷ While the National Restaurant Association believes that the Food and Drug Administration has positively addressed the obesity concern and provides the industry with the ability to implement the law in a way that will benefit consumers, many restaurants have expressed concern that the cost of the law will outweigh any potential health benefits.¹³⁸

Even though many restaurants in New York City argued against compliance with calorie disclosure laws, the City continued to enforce the regulation for certain health benefits.¹³⁹ When New York City implemented its own citywide regulation, New York State Restaurant Association specifically opposed the regulation for policy reasons and infeasibility of costs to the restaurants.¹⁴⁰ These costs include providing the information

¹³¹ *Id.*

¹³² Knef, *supra* note 88.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Diage, *supra* note 128.

¹³⁷ Rosenbloom, *supra* note 68.

¹³⁸ 21 C.F.R. § 101.11 (2016).

¹³⁹ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 122 (2d. Cir. 2009).

¹⁴⁰ *Notice of Adoption of an Amendment (§81.50) to Article 81 of the New York City Health Code*, NYC.GOV,

and the potential loss of customers.¹⁴¹ In response, New York City argued that the potential health benefits outweighed the costs to restaurants.¹⁴² Additionally, the City claimed that the cost of reproducing the menus to include calorie counts would be a one-time cost and that the limited space on a menu does not constitute a barrier to enforceability of the law.¹⁴³

Individual businesses also provided arguments against the regulation, specifically restaurants whose customers create their own meal, producing a broad range for calorie disclosures. For example, American Pizza Community argued that it would be difficult to display calorie counts because generally multiple consumers share pizzas, whole pies are sliced differently each time, and there is a plethora of combinations of toppings.¹⁴⁴ Pizza chains also worry that if they list calorie counts for an entire pie rather than by the slice, consumers may be turned away from their business, thinking that the calories are much higher than what they are actually consuming.¹⁴⁵

Grocery stores, movie theaters, and other businesses also have asked for exemption from the regulation.¹⁴⁶ Grocery stores argue that fresh made food changes so regularly that calorie disclosures would be impractical and would only have a negative impact.¹⁴⁷ There are also numerous dishes that would require labeling and build your own meals, like a salad bar, would be difficult to provide a calorie disclosure for since it depends on how much food a consumer puts in the container.¹⁴⁸ The Food Marketing Institute announced that the costs of analyzing and disclosing calories on prepared foods would be so high that consumers could possibly lose freshly made foods option.¹⁴⁹ Alternatively, complying with the requirement may instead force Kroger to reduce the number of employees or increase the costs for consumers.¹⁵⁰

While the regulation targets only qualifying establishments with 20 or more chains, independent restaurants and small businesses are also

<http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf> (last visited Apr. 1, 2016).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Bowman, *supra* note 105.

¹⁴⁵ Kate Taylor, *FDA Extends Deadlines for Chain Restaurant to Add Calorie Counts to Menus*, ENTREPRENEUR (July 13, 2015), <http://www.entrepreneur.com/article/248352>.

¹⁴⁶ Tracy, *supra* note 98.

¹⁴⁷ *Id.*

¹⁴⁸ Taylor, *supra* note 145.

¹⁴⁹ Tracy, *supra* note 98.

¹⁵⁰ *Id.*

impacted.¹⁵¹ If society adjusts to the calorie disclosures and relies on them when making meal decisions, small businesses may suffer if they do not also provide this information.¹⁵² However, many small businesses might not be able to afford the costs of new signage or hiring a nutritionist.¹⁵³ Additionally, the new regulation may cause small restaurants to consider the calories in their meals and reconsider the ingredients being added.¹⁵⁴ According to a 2013 study of 157 popular restaurant meals served in Boston, small restaurants on average have higher calorie counts than fast food chains.¹⁵⁵ This study also found that restaurants that did not report calorie information tended to have higher calorie counts on average.¹⁵⁶ Based on a similar study, the average calorie count was 6% higher for small restaurants than chains.¹⁵⁷ Another study conducted by Johns Hopkins Bloomberg School of Public Health found that fast food chains that voluntarily disclose calories consistently served less caloric meals.¹⁵⁸ While §4205 does not expressly cover small businesses, they could be indirectly impacted, which could positively contribute to the goal of reducing obesity or could negatively cause a reduction in non-chain restaurants.

Since effectiveness of this regulation is currently inconclusive, but businesses are nonetheless required to comply with §4205, businesses can only hope that it is too early to tell if the new law will reduce American's obesity so that their expenditures will be worth it in the long run. When restaurants nationwide provide calorie counts and consumers begin expecting nutritional information about their meals on menus, we might see the benefits of this new regulation. However, for now there has been little change even in restaurants that began disclosing nutritional information

¹⁵¹ Kelly Spors, *What the FDA's New Calorie Count Rules Mean for Small Restaurants*, (Nov. 25, 2014), <https://www.americanexpress.com/us/small-business/openforum/articles/fdas-new-calorie-count-rules-mean-small-restaurants/>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Deborah Kotz, *Calorie Counts in Small Boston Restaurants Higher than Area in Fast Food Chains, Tufts Study Finds*, (May 13, 2013, 5:14 PM), <http://www.boston.com/lifestyle/health/blogs/daily-dose/2013/05/13/calorie-counts-small-boston-restaurants-higher-than-area-fast-food-chains-tufts-study-finds/krKm6hPygSRnEHAWs1d1vl/blog.html>.

¹⁵⁶ *Id.*

¹⁵⁷ Tufts Univ., *Independent and Small-Chain Restaurant Meals Exceed Recommended Daily Calorie Needs*, TUFTSNOW (May 13, 2013), <http://now.tufts.edu/news-releases/independent-and-small-chain-restaurant-meals-#sthash.0GQzwZ4z.dpuf>.

¹⁵⁸ *Large Chain Restaurants Appear To Be Voluntarily Reducing Calories in Their Menu Items*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Oct. 8, 2014), <http://www.jhsph.edu/news/news-releases/2014/large-chain-restaurants-appear-to-be-voluntarily-reducing-calories-in-their-menu-items.html>.

years ago.¹⁵⁹ Further research on the benefits and costs is necessary to determine the ultimate effectiveness of §4205.

IV. EFFECTIVENESS

The states and cities that have implemented calorie disclosure regulations claim the effectiveness is inconclusive. Some businesses that have voluntarily added calorie labels to their menus or already complied with the regulation have expressed that they are not seeing any changes in consumer purchases.¹⁶⁰

The USDA has conducted research on the effectiveness of the regulation and found that Americans who use the calorie information when making meal decisions are those who tend to “eat out less frequently, have other healthy behaviors (such as having dark green vegetables at home), rate their diets as good, are women, and participate in SNAP.”¹⁶¹ Despite there being groups of people who use the calorie information to make a meal decision, many studies have found that obesity rates have not changed and that consumer health has not improved. Another study conducted in New York City and Newark, NJ found that 54% of the study’s New York City subjects and 16% of Newark subjects noticed the nutritional information inside a restaurant.¹⁶² Additionally, 27% of the New York City subjects who noticed the nutritional information said that they took it into account when making a decision.¹⁶³ However, the researchers found no effect on the total number of calories purchased after analyzing the customers’ receipts.¹⁶⁴ Even those who claimed to have seen the posted information and took it into account did not reduce their caloric intake at the restaurant.¹⁶⁵

Similarly, a study of low-income adults in Philadelphia and New York City, conducted by a research team led by an NYU Medical School professor, found that two-thirds of McDonald’s customers did not notice the calorie labels and that the regulation had no effect on fast-food consumption.¹⁶⁶ The research team also noted that the regulation is difficult

¹⁵⁹ Bowman, *supra* note 105.

¹⁶⁰ *Id.*

¹⁶¹ Nestle, *supra* note 65.

¹⁶² See Brian Elbel, Rogan Kersh, Victoria L. Brescoll & L. Beth Dixon, *Calorie Labeling And Food Choices: A First Look At The Effects On Low-Income People In New York City*, 28 HEALTH AFFAIRS (Web Exclusive) w1110, w1114-15 (Oct. 6, 2009), available at <http://content.healthaffairs.org/content/28/6/w1110.abstract>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Stverak, *supra* note 107.

to enforce because “ensuring accurate calorie counts is both expensive and time-consuming for inspectors.”¹⁶⁷

In another study conducted by the New York City Department of Health, only 3.1% of customers reported noticing calorie counts at restaurants that voluntarily provided calorie information.¹⁶⁸ In contrast, a study by researchers at the Arizona State University School of Nutrition and Health Promotion found that 60% of customers said they noticed the labels, but only 16% used the calorie information when making decisions about their meal purchase.¹⁶⁹ Additional studies have not provided evidence that menu labeling is effective for decreasing obesity.¹⁷⁰ Specifically for non-restaurants, two studies about menu labeling have produced mixed results, either showing no effect¹⁷¹ or only an effect when combined with recommended daily caloric intake disclosures.¹⁷² For other non-restaurant calorie disclosures, including cafeterias, similar inconsistent and ineffective results were found.¹⁷³

Likewise, studies in New York City and King County, Washington found that calorie disclosures had little or no effect, even in low-income areas.¹⁷⁴ This result may be due to consumers looking past or ignoring calorie counts or not understanding the nutritional meaning of calorie data due to young age, lack of education, socio-economic status, or other factors.¹⁷⁵ Another factor could be that consumers consider certain foods healthier when compared to other unhealthy foods on the menu.¹⁷⁶ Multiple studies revealed that individuals evaluate their options, including the

¹⁶⁷ *Id.*

¹⁶⁸ See Bernell, *supra* note 60, at 843 (citing Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City*, 98 AM. J. PUB. HEALTH 1457, 1458 (2008)).

¹⁶⁹ David Kinkade, *Studies Cast Doubt on Value of Mandated Calorie Counts*, U.S. CHAMBER OF COMMERCE (March 3, 2015, 10:15 AM), <https://www.uschamber.com/above-the-fold/studies-cast-doubt-value-mandated-calorie-counts>.

¹⁷⁰ See Bernell, *supra* note 60, at 844-45.

¹⁷¹ *Id.* at 844 (citing Lisa J. Harnack et al., *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results From an Experimental Trial*, 5 INT. J. BEHAV. NUTR. PHYS. ACT. 63 (2008)).

¹⁷² *Id.* (citing Christina A. Roberto et al, *Evaluating the Impact of Menu Labeling on Food Choices and Intake*, 100 AM. J. PUB. HEALTH 312, 312-318 (Feb. 2010)).

¹⁷³ See Elbel, *supra* note 162, at w1117.

¹⁷⁴ James G. Hodge, Jr., *Food Fight!: The Legal Debate Over the Obesity Epidemic, Food Labeling, and the Government's Involvement in What You Eat: Alternative Models to Supplement Menu Labeling*, 17 NEXUS J. OP. 79, 88 (2011/2012).

¹⁷⁵ *Id.*

¹⁷⁶ Jason M. Szanyi, *Brain Food: Bringing Psychological Insights to Bear on Modern Nutrition Labeling Efforts*, 65 FOOD & DRUG L. J. 159, 177 (2010).

reasonableness of their choices, in the context of the surrounding information.¹⁷⁷ When a customer is browsing a menu and notices calorie information, they may need additional information to make an appropriate decision of the level of nutrition in a meal. For example, providing the daily-recommended caloric averages or average calorie intake for breakfast, lunch, or dinner would produce a more accurate guide for what the calorie count means and how to use it.¹⁷⁸

How consumers use the calorie information is very important to reducing obesity. Counting calories alone does not necessarily mean that consumers will lose weight; the types of food that are being chosen also have an effect.¹⁷⁹ A Harvard University study found that consuming sugary drinks and potatoes contributed directly to weight gain, while eating the same amount of calories in nuts may actually lead to weight loss.¹⁸⁰ Since the law requires only calorie disclosures, but does not require the disclosure of other nutritional information one should take into account when making meal decisions,¹⁸¹ some restaurant owners claim that the new regulation is ineffective because it is under-inclusive.¹⁸² The regulation is also under-inclusive because, as discussed above, small restaurants are exempt from the regulation, even though studies have found that small restaurants produce higher calorie meals than fast food chains that must comply.¹⁸³ Since the regulation could be under-inclusive, but still impacts many businesses, restaurant owners argue that the costs of §4205 outweigh the currently inconclusive benefits.¹⁸⁴

There are also several hurdles §4205 must overcome in order to be effective. One is that Americans order meals quickly without reading the entire menu or information surrounding the description of the meal.¹⁸⁵ Since fast food restaurants were created so that the consumer could quickly grab something to eat, most consumers eating at these establishments are likely to skim through a menu and order based on pictures.¹⁸⁶ When there is clutter or a lot of text on a menu, consumers in a rush might become overwhelmed, especially if calorie disclosures are additionally listed on the menu.¹⁸⁷ They are more likely to ignore additional information or

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Hodge, Jr., *supra* note 174.

¹⁸⁰ *Id.*

¹⁸¹ Royal, *supra* note 125, at 179-80.

¹⁸² *Id.* at 197.

¹⁸³ *Id.* at 180.

¹⁸⁴ *Id.* at 197.

¹⁸⁵ Szanyi, *supra* note 176.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

information that they do not view as relevant, given the substantial amount of text already provided on the menu.¹⁸⁸

Another hurdle is regulating and enforcing the new law after implementation. Regulating and enforcing §4205 could be difficult for the FDA because there will likely be variance in the calorie count posted on menus and the actual calorie count in a sample. For example, a study by Tufts University researchers found that the actual calories in a sample ranged from 18% to 200% higher than the amount stated on the menu.¹⁸⁹ Changing consumer behaviors and maintaining enforcement of the law are just some of the many challenges of the effectiveness of §4205.

V. ALTERNATIVE SUGGESTIONS

Restaurant owners who oppose the regulation claim that there are alternative means to providing the information that would be more cost effective for businesses and could still have the same impact.¹⁹⁰ For example, providing brochures or links to a website with nutritional information could reduce the burden placed on businesses. Having the information available to those who request it could equally be as effective as providing the calorie count on a menu since those who are interested in counting calories enough to use the information to make a purchase decision would seek the information through any means. Those who are not interested in considering calories when making a meal decision would ignore the calorie count wherever it is provided.

Rather than requiring calorie disclosures, restaurants can make less costly adjustments that cause a bigger impact on America's health. Changing portion sizes or using more organic ingredients can help resolve the obesity problem without costing small businesses the burdensome fees associated with changing and updating their labeling. Individuals can choose to split dishes between two or more people or divide the dish when it first arrives to encourage better portion control.¹⁹¹ That way, part of the meal can be taken home and the individual will not feel so full, which contributes to inactivity directly after a meal. Employees should inform customers of each dish size so consumers can decide if they want a smaller option. Restaurants can also create chef specialty items or a low-calorie menu with offerings for those who are more health conscious.¹⁹² For

¹⁸⁸ *Id.*

¹⁸⁹ Lorien E. Urban et al., *The Accuracy of Stated Energy Contents of Reduced-Energy, Commercially Prepared Foods*, 110 J. AM. DIETETIC ASS'N 116, 116 (2010).

¹⁹⁰ Banker, *supra* note 5, at 919.

¹⁹¹ Molly Patterson, *Menu Calorie Count Debate*, THE BACK BURNER (April 8, 2013), <http://blog.etundra.com/in-the-restaurant/menu-calorie-count-debate/>.

¹⁹² *Id.*

example, beef burgers should be offered with alternatives like turkey burgers, black bean patties, portabella mushroom caps, etc. Side dishes should also be able to be substituted. For example, a salad, soup, or sweet potato fries should be an alternative option for french fries.¹⁹³

In addition to alternatives for restaurants and consumers at the point of purchase, local governments should promote healthy lifestyles and encourage more exercise and fun activities in society. Communities can organize events to promote healthy living like walking/running fundraisers, adult sports like softball, volleyball, or soccer, or a local dog shelter bringing dogs and Frisbees to a park. This also fosters community engagement and creates a social environment with physical activity. Additionally, local governments should produce campaigns to raise awareness of healthy eating and interpreting calorie disclosures. They should educate the public on portion control, the types of foods we should be eating, and the consequences of eating unhealthy ingredients or too much.

VI. CONCLUSION

Since covered restaurant establishments have one year and vending machine operators have two years to comply with §4205, we have yet to see any changes in Americans' health or the reduction of obesity in America. The only changes currently identifiable have been the financial costs on businesses that must hire nutritionists and pay for new signage. Even small businesses that are not directly covered by the regulation may be negatively impacted if they are pressured to provide calorie information as well. The conflict between freedom of choice and meal creativity or consumer health and nutritional disclosure has left restaurants and similar businesses to question if their efforts will truly make a difference in the health of this country.

¹⁹³ *Id.*